IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re WALLACE G. WILKINSON, Debtor,	No. 01-50281 Chapter 11 E.D. Kentucky, Lexington Div. Chief Judge William S. Howard
In re WALLACE&S BOOKSTORES, INC., Debtor,	No. 01-50545 Chapter 11 E.D. Kentucky, Lexington Div. Chief Judge William S. Howard
In re FINIS.COM, INC., Debtor.	No. 01-51800 Chapter 7 E.D. Kentucky, Lexington Div. Judge Joseph M. Scott, Jr.
COSTA GEORGE REGAS; L. JEFFERY HAGOOD; DONALD B. DICKEY; DONALD BREWER; KIRK A. HUDDLESTON; HERMAN GETTELFINGER; TRACY THOMPSON; NICK CAZANA; LARRY D. GRAVES; CHRIS GETTELFINGER; ROBERT PEDDLE; FRED R. LANGLEY; GANELLE O. ROBERTS; TYLER THOMPSON; NICHOLAS A. LIAKONIS; MARK S. HAHN; JOSEPH R. ZAPPA, JR.; JOSEPH CONSTRUCTION CO., INC.; ZAPPA HARNESS PARTNERSHIP; FOOTHILLS PARKWAY ASSOCIATES; and THOMAS HAHN, Plaintiffs, vs. I. LORRAINE THOMAS, personal representative of the Estate	Adv. Pro. No. 01-3132

of R. David Thomas; JAMES McGLOTHLIN; UNITED COMPANY; McGLOTHLIN FOUNDATION; L.D. GORMAN; ELMER WHITAKER; RONALD V. JOYCE; GEORGE VALASSIS; and FROST BROWN TODD, LLC,

Defendants.

M E M O R A N D U M

APPEARANCES:

CHARLES A. WAGNER III, ESQ.
MARTIN B. BAILEY, ESQ.
WAGNER, MYERS & SANGER, P.C.
1801 First Tennessee Plaza
Knoxville, Tennessee 37929
Attorneys for Plaintiffs

RONALD C. KOKSAL, ESQ.
BUTLER, VINES & BABB, PLLC
810 AmSouth Center
507 South Gay Street
Knoxville, Tennessee 37901-2649
Attorneys for L.D. Gorman

W. RANDALL WILSON, ESQ.
WILLIAM A. HARRIS, III, ESQ.
Miller & Martin LLP
1000 Volunteer Building
832 Georgia Building
Chattanooga, Tennessee 37402

-and-

DENNIS M. HAFFEY, ESQ.
RONALD L. ROSE, ESQ.
SCOTT W. DALES, ESQ.
DYKEMA GOSSETT PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, Michigan 48304-2820
Attorneys for George Valassis

ANDREW L. COLOCOTRONIS, ESQ.
BAKER, DONELSON, BEARMAN & CALDWELL
2200 Riverview Tower
900 South Gay Street
Knoxville, Tennessee 38018

-and-

SAMUEL D. HINKLE IV, ESQ.
STOLL, KEENON & PARK, LLP
2650 Aegon Center
400 West Market Street
Louisville, Kentucky 40202-3377

-and-

WILLIAM L. MONTAGUE, ESQ.
LAURA DAY DELCOTTO, ESQ.
STOLL, KEENON & PARK, LLP
300 West Vine Street, Suite 2100
Lexington, Kentucky 40407-1801
Attorneys for James W. McGlothlin, The United Company, The McGlothlin Foundation and Elmer Whitaker

ANDREW L. COLOCOTRONIS, ESQ.
BAKER, DONELSON, BEARMAN & CALDWELL
2200 Riverview Tower
900 South Gay Street
Knoxville, Tennessee 38018

-and-

KEVIN B. BYRD, ESQ.
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, District of Columbia 20001-2113
Attorneys for Ronald V. Joyce

MELINDA MEADOR, ESQ.
E. BRUCE FOSTER, JR., ESQ.
BASS, BERRY & SIMS PLC
1700 Riverview Tower
900 South Gay Street
Knoxville, Tennessee 37902

-and-

MICHAEL L. DAGLEY, ESQ.
MATTHEW M. CURLEY, ESQ.
BASS, BERRY & SIMS PLC
315 Deaderick Street, Suite 2700
Nashville, Tennessee 37238
Attorneys for Frost Todd Brown LLC

JOHN A. LUCAS, ESQ.
JAMES. S. CHASE, ESQ.
HUNTON & WILLIAMS
900 South Gay Street
Riverview Tower
Knoxville, Tennessee 37902

-and-

PETER S. PARTEE, ESQ.
JESSE SILVERMAN, ESQ.
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

-and-

DUKE W. THOMAS, ESQ.
TERRY M. MILLER, ESQ.
VORYS, SATER, SEYMOUR & PEASE, LLP
52 East Gay Street
Columbus, Ohio 43216
Attorneys for I. Lorraine Thomas, personal representative of the Estate of R. David Thomas

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is presently before the court on the plaintiffs' motion to remand and/or abstain and a motion to transfer venue filed by defendants James McGlothlin, The United Company, The McGlothlin Foundation and Elmer Whitaker. For the reasons discussed below, the motion to abstain will be granted and the motion to transfer venue will be denied as moot. Resolution of these motions is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). *See Smith Mech. Contractors, Inc. v. Premier Hotel Dev. Group (In re Premier Hotel Dev. Group)*, 270 B.R. 243, 246 (Bankr. E.D. Tenn. 2001).

I.

The first few paragraphs of the amended complaint filed by the plaintiffs on March 29, 2002, summarize the contentions of the plaintiffs in this lawsuit. As set forth therein:

This is a Complaint for (1) conspiracy to commit fraud and securities fraud and (2) fraud and securities fraud. The Plaintiffs were induced by deceit, mis-representations and false and fraudulent communications from the Defendants by and through, inter alia, a Subscription Agreement and a Business Plan, prepared at least in part by Brown Todd & Heyburn, PLLC (the predecessor to Frost Brown Todd, LLC), to invest in an unregistered securities offering by a "dot.com" company known as *e*campus.com (sometimes the "Company), which was founded, organized, promoted and controlled by Defendants and by a conspiracy of the Defendants individually and through ownership in Wallace's Bookstores, Inc. ("WBI") and through loans to Wallace Wilkinson ("Wilkinson"). *E*campus.com ostensibly was created to sell textbooks to college students over the Internet. In fact, it was created by the Defendants as a conspiracy to raise capital from outside sources to "bailout" a Ponzi scheme in which they were involved with Wilkinson to "take *e*campus.com public," and to use the proceeds of the "dot.com" offering to repay massive loans the Defendants had made to Wilkinson on a short-term, high interest basis. All of the Defendants participated in the conspiracy and took overt acts in furtherance of the conspiracy.

Neither the Defendants nor the Subscription Agreement nor the Business Plan disclosed critical information known by the Company and the other Defendants that would have revealed that the *e*campus.com securities offering was patently unmarketable and that funds from the offering were to be used for the benefit of all or most of the Defendants and entities owned and/or controlled by the Defendants other than Frost Brown Todd, LLC ("Frost Brown")(sometimes referred to as the "non-attorney Defendants"). This suit is brought against the non-attorney Defendants because they are and were, variously, organizers, founders, promoters, directors, shareholders, and through these and other relationships with and actions taken on behalf of the Company, co-conspirators and controlling persons of *e*campus.com, Wilkinson and/or WBI and/or they

> promoted *e*campus.com. Defendant R. David Thomas ("Thomas") recruited and induced certain of the Plaintiffs to invest in the *e*campus.com offering based upon misrepresentations and inaccurate and incomplete information. This suit is brought against Frost Brown because its attorneys took overt acts in furtherance of the conspiracy when it prepared the Subscription Agreement, the Business Plan, and assisted in the promotion and issuance of the stock in *e*campus.com with knowledge that the promotional materials were false and misleading and with the knowledge that the securities "dot.com" offering was designed to "bailout" a massive Ponzi scheme that was on the brink of collapse.

Based on these allegations, the plaintiffs assert two different counts which they claim entitle them to judgment against the defendants. In Count I the plaintiffs assert that "[t]he Defendants and *e*campus.com's misrepresentations and failures to disclose ... were material misrepresentations, omissions and nondisclosures under TENN. CODE ANN. § 48-2-121, KY. REV. STAT. ANN. § 282.480, and FLA. STAT. ANN. § 517.201 et. seq," for which the defendants are liable as conspirators and controllers and promoters of *e*campus.com. The plaintiffs allege that "[t]he Defendants are all liable for the material misrepresentations, omissions and nondisclosures of *e*campus.com because they all conspired to be controlling persons of *e*campus.com under the Tennessee, Florida, and Kentucky statutes and because they were promoters." The plaintiffs further allege that the Defendants are liable as

aiders and abettors because they "conspired with each other and aided and abetted *e*campus.com, Wilkinson, and WBI in the manipulative and fraudulent devices practiced on the Plaintiffs."

Count II is a claim by the plaintiffs for common law fraud, negligent misrepresentation and conspiracy. The plaintiffs allege that "[t]he Defendants' misrepresentations, omissions and nondisclosures of material facts were made with the conspiratorial intent to deceive the Plaintiffs or in willful and/or reckless disregard for the truth," that the plaintiffs relied on these representations, and were damaged as a result. In their prayer for relief, the plaintiffs request a jury trial and that they be awarded compensatory, incidental, and statutory damages, plus "punitive damages in an amount no less than $100 million or 10% of each Defendant's net worth, whichever is greater."

The original complaint commencing this lawsuit was filed by the plaintiffs on August 3, 2001, in the Circuit Court for Knox County, Tennessee. Several months prior to that commencement, on February 5, 2001, an involuntary chapter 7 bankruptcy petition was filed against Wallace G. Wilkinson, a former governor of Kentucky, in the Lexington Division of the United States Bankruptcy Court for the Eastern District of

Kentucky. A few days later, Mr. Wilkinson converted the case to chapter 11. Thereafter, on February 28, 2001, Wallace Bookstores, Inc. ("WBI"), a paperback bookstore first opened by Mr. Wilkinson in 1962 and which "eventually grew into one of the largest college and university bookstores and textbook management companies in the country" filed for chapter 11 bankruptcy protection in the District of Delaware, along with 61 other companies which it owned. Pursuant to Fed. R. Bankr. P. 1014, the bankruptcy cases of WBI and the other 61 companies were transferred to the bankruptcy court for the Eastern District of Kentucky on March 2, 2001. Subsequently, on June 8, 2001, *e*campus.com[1] filed for bankruptcy relief under chapter 11 in the Eastern District of Kentucky.

On September 7, 2001, after the commencement of the present action in Knox County Circuit Court on August 3, 2001, defendant George Valassis filed a notice removing the lawsuit to this court pursuant to 28 U.S.C. § 1452. Similar notices of removal were filed by defendants McGlothlin, United Company, McGlothlin Foundation and Whitaker on September 10

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[1]According to its bankruptcy case docket, the actual name of the corporation at the time of its bankruptcy filing was "*e*CAMPUS.com, Inc." After a court approved the sale of substantially all of *e*campus.com's assets, including perhaps its name, notice was given to parties in interest on October 16, 2001, that the debtor's name had changed to "Finis.com, Inc."

and by defendant R. David Thomas on September 12, 2001. Also on September 12, 2001, defendants McGlothlin, United Company, McGlothlin Foundation and Whitaker (the "transfer defendants") filed a motion to transfer venue to the Bankruptcy Court for the Eastern District of Kentucky pursuant to 28 U.S.C. § 1412. The plaintiffs responded to the removal by filing a motion to remand and/or abstain on September 19, 2001.[2]

Defendants L.D. Gorman and Frost Brown Todd LLC have filed responses in which they concur with the plaintiffs' remand motion. On the other hand, defendants Valassis and Ronald V. Joyce have responded that they concur with the motion to transfer venue. Although defendant Thomas initially responded in opposition to both motions, in a supplemental brief filed April 9, 2002, the personal representative of his estate requested "that the Court remand this civil action to the Circuit Court for Knox County, Tennessee."[3]

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[2]Resolution of these motions by this court was delayed while a motion for the withdrawal of the reference by defendant Thomas was pending before the district court. After leave to withdraw that motion was granted to Mr. Thomas by order of the district court on January 8, 2002, oral arguments on the motions before this court were heard April 26, 2002.

[3]Mr. Thomas died on January 8, 2002, and the personal representative of his estate, I. Lorraine Thomas, was substituted in his place by order entered April 1, 2002.

As the basis for their motion, the transfer defendants assert that the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington Division (the "Kentucky bankruptcy court"), is the more appropriate forum for litigation of this adversary because it arises in and is related to the bankruptcy cases pending there. The transfer defendants also assert such a transfer would conserve judicial resources, save the parties and witnesses time and money that would otherwise be expended in separate proceedings, and protect against the possibility of inconsistent rulings. In the alternative, the transfer defendants request that this court stay this proceeding pending the outcome of the bankruptcy cases in Kentucky.

In support of their motion to remand and/or abstain, the plaintiffs argue that removal was improper because this court lacks subject matter jurisdiction under 28 U.S.C. § 1334 since "this is neither a core proceeding nor a case 'arising in' or 'related to' any bankruptcy." In the alternative, the plaintiffs contend that abstention is required under 28 U.S.C. § 1334 or that the case should be remanded on equitable grounds under 28 U.S.C. § 1452(b).

II.

The initial inquiry for this court is which motion should be considered first: the remand motion or the transfer motion? The transfer defendants assert that the proper course of action for a "conduit" court faced with both a motion to remand and/or abstain and a motion to transfer is to grant the motion to transfer so that the "home court," i.e., the court where the bankruptcy cases are pending, may resolve all other outstanding motions. In support of this proposition, the transfer defendants cite *Aztec Industries, Inc. v. Standard Oil Co. (In re Aztec Industries, Inc.)*, 84 B.R. 464 (Bankr. N.D. Ohio 1987); *Kinney Systems, Inc. v. Intermet Realty Partnership (In re Convent Guardian Corp.)*, 75 B.R. 346 (Bankr. E.D. Pa. 1987); and *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 B.R. 123 (Bankr. D. Mass. 1984).

Granted, these cases do state that the proper role of a bankruptcy court to which an action has been removed is to transfer the action to the "home court" to decide abstention and remand issues. *See In re Aztec Indus., Inc.*, 84 B.R. at 467; *In re Convent Guardian Corp.*, 75 B.R. at 347; *Seybolt*, 38 B.R. at 128. These courts note that the home court is more familiar with the pending bankruptcy case and what may be required for its efficient administration and that the home court is in the best position to evaluate the equitable

considerations underlying a remand request. *See In re Aztec Indus., Inc.*, 84 B.R. at 467; *Seybolt*, 38 B.R. at 128.

However, even these courts concede that jurisdictional issues raised by the parties must first be addressed by the conduit court prior to the transfer because "[i]f there is a jurisdiction defect and the parties and the action are not properly before the Court, any action taken by the Court would be void." *In re Aztec Indus., Inc.*, 84 B.R. at 467. *Cf. In re Convent Guardian Corp.*, 75 B.R. at 347 (stating that no jurisdictional issue had been raised); *Seybolt*, 38 B.R. at 128 (court concluded that it had jurisdiction prior to granting motion for change of venue). *See also Lone Star Indus., Inc. v. Liberty Mut. Ins.*, 131 B.R. 269, 272 (D. Del. 1991)("The court's jurisdiction over a matter must be established before non-jurisdictional issues can be addressed," a principle which "dictates that the court first determine, as a preliminary matter, whether the [state court] case was properly removed.").

Furthermore, the court notes that the cited cases were decided over 15 years ago. In more recent decisions, "courts faced with cross-motions for remand and change of venue consider the remand motion first and, if remand is denied, turn to the motion for change of venue." *Renaissance*

Cosmetics, Inc. v. Dev. Specialists, Inc., 277 B.R. 5, 11 (S.D.N.Y. 2002). *See also Hosp. Serv. Dist. No. 3 of the Parish of LaFourche v. Fid. & Deposit Co. of Md.*, 1999 WL 294795 at *9 (E.D. La. May 11, 1999); *Md. Cas. Co. v. Aselco, Inc.*, 223 B.R. 217, 222 (D. Kan. 1998); *Universal Well Serv., Inc. v. Avoca Natural Gas Storage*, 222 B.R. 26, 32 (W.D.N.Y. 1998); *Lone Star Indus., Inc.,* 131 B.R. at 272; *Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863, 865 (N.D. Ill. 1991); *Brizzolara v. Fisher Pen Co.*, 158 B.R. 761, 769 (Bankr. N.D. Ill. 1993) (all resolving abstention and remand issues prior to change of venue requests). In response to the argument that the court should defer the remand issue to the home court, the court in *Lone Star Industries* stated:

> This deferral procedure ... assumes that venue of the adversary proceeding should be transferred ... and thus merely begs one of the substantive questions the parties want this court to resolve. Likewise, this deferral procedure vitiates the requirements of the venue transfer statute.
>
> Moreover, as a logical and practical matter, the court should determine *whether any* bankruptcy court should hear a proceeding before it determines *which* bankruptcy court should hear it.

Lone Star Indus., Inc., 131 B.R. at 273 (emphasis in original).

This court finds this approach to be the better reasoned one. And, to the extent that it is relevant, it should be

noted that in each of the cases cited by the transfer defendants, the debtor was a party to the removed state court action and the party requesting transfer to its home bankruptcy court. Thus, it was logical to defer the equitable considerations required for a remand determination to the bankruptcy court of the debtor. In contrast, in the instant case the debtor is not a movant or a party. Accordingly, the court will address the plaintiffs' remand and abstention motion before addressing the motion to transfer venue.

III.

The plaintiffs assert that this case must be remanded to state court because it was improperly removed. As previously noted, removal was pursuant to 28 U.S.C. § 1452(a) which states that:

> A party may remove any claim or cause of action ... to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

As § 1452 clearly denotes, the propriety of the removal turns on whether the court has jurisdiction under § 1334 of title 28, the statutory basis for the district court's jurisdiction over bankruptcy matters. Under this provision, the district court has original and exclusive jurisdiction over "all cases

under title 11," *see* 28 U.S.C. § 1334(a); and original but not exclusive jurisdiction of "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).[4] Of course, the instant proceeding is not a "case[] under title 11"; those are the bankruptcy cases pending in the Kentucky bankruptcy court. Therefore, the relevant issue is whether this adversary proceeding arises under, arises in, or is related to a case under title 11. If none of these jurisdictional bases are applicable, the adversary proceeding must be sent back to the state court for want of jurisdiction and improper removal. *See, e.g., Haworth, Inc. v. Sunarhauserman Ltd./Sunarhauserman Ltee,* 131 B.R. 359, 361 (Bankr. W.D. Mich. 1991).

The transfer defendants contend that this proceeding both arises in and under title 11, and that at a minimum, "related to" jurisdiction exists. As previously recognized by this court, "[a] proceeding 'arises under' the Bankruptcy Code if

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[4]Section 1334(a) and (b) states that:
(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

it asserts a cause of action created by the Code while proceedings 'arising in' a bankruptcy case are those that could not exist outside of a bankruptcy case." *In re Premier Hotel Dev. Group*, 270 B.R. at 252 (quoting *Personette v. Kennedy (In re Midgard Corp.*), 204 B.R. 764, 771 (B.A.P. 10th Cir. 1997)). Actions in these two categories are collectively referred to as "core proceedings." *See* 28 U.S.C. § 157(b)(2). To support their contention that this proceeding is core, the transfer defendants make the general statement that this action "requires the adjudication of numerous issues that will impact the administration of the Bankruptcy Cases pending in the Kentucky Bankruptcy Court." They also observe that the plaintiffs have filed proofs of claim in the Wilkinson bankruptcy case based on the same allegations raised in this proceeding: that they are entitled to be reimbursed for the amount of their investments due to fraud in connection with the sale of *e*campus.com securities.

While resolution of plaintiffs' proofs of claim is admittedly a core proceeding, *see* 28 U.S.C. § 157(b)(2)(B); this adversary is not a resolution of plaintiffs' claims against Mr. Wilkinson or any of the debtors in the Kentucky bankruptcy court. Instead, it is a fraud action strictly against nondebtors, notwithstanding the contention that the

debtors conspired with the defendants. While this allegation and the assertion that this proceeding will impact the administration of the bankruptcy cases may form the basis for "related to" jurisdiction, which is addressed below, it is insufficient to confer jurisdiction under the "arising under or in" clauses of § 1334. This action neither "invokes a substantive right provided by title 11" nor "is a procedure that, by its nature, could arise only in the context of a bankruptcy case," *see Wood v. Wood (Matter of Wood)*, 825 F.2d 90, 97 (5th Cir. 1987); as is illustrated by the very fact that it was commenced in state court. Therefore, this action was properly removed only if it is "related to" one of the cases pending in the Kentucky bankruptcy court.

The Sixth Circuit Court of Appeals has adopted the *Pacor* test for relatedness:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of* [that] *proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Robinson v. Mich. Consol. Gas Co., 918 F.2d 579, 583 (6th Cir. 1990)(quoting *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984)(emphasis in original)). Subsequent to the *Robinson* decision, the Supreme Court weighed in on the subject, referring to the court's bankruptcy jurisdiction as "comprehensive" but not "limitless" and observing that "related to" proceedings include "suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995).

In *Dow Corning*, the Sixth Circuit utilized this standard to conclude that a district court had "related to" jurisdiction over a suit between nondebtors based on the fact that one of the defendants had contribution and indemnification claims against the debtor. *See Lindsey v. O'Brien, Tanksi, Tanzer and Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 489 (6th Cir. 1996). The transfer defendants cite *Dow Corning* as authority for their assertion that "related to" jurisdiction exists in the present proceeding, noting that defendants United Company, McGlothlin Foundation and Whitaker have filed claims in the Wilkinson bankruptcy case for indemnity and contribution for any losses sustained in this lawsuit. The transfer defendants

also observe that this action is predicated on the joint conduct of the defendants and state that the Sixth Circuit recognized in *Dow Corning* that its previous decision in *Salem Mortgage Co.* "has been cited for the proposition that 'when a plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334.'" *In re Dow Corning Corp.*, 86 F.3d at 492 (quoting *In re Wood*, 825 F.2d at 94 (citing *Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 634 (6th Cir. 1986)).

In response to these assertions, the plaintiffs note that the proofs of claim for indemnity and contribution were not filed until after the notices of removal were filed in this case and cite the general rule that the propriety of removal must be tested at the time of removal. *See Pullman Co. v. Jenkins*, 305 U.S. 534 (1939); *Union Planters Nat'l Bank of Memphis v. CBS, Inc.*, 557 F.2d 84 (6th Cir. 1977); *Blair v. Migliorini*, 744 F. Supp. 165, 167 (N.D. Ohio 1990). Accordingly, the plaintiffs request that the court reject what they characterize as transfer defendants' "'after-the-fact' attempts to manufacture jurisdiction." The plaintiffs also contend that the defendants have failed to establish a right

to contribution or indemnity and maintain to the contrary that no such right exists, either statutorily or under common law.

The plaintiffs' argument appears to be that the transfer defendants have insufficiently pled jurisdiction in their removal notice and alternatively, that no jurisdiction in fact exists. With respect to the first assertion, this court disagrees. The removal notice filed by the transfer defendants described the present action and the three cases in the Kentucky bankruptcy court and stated that this court has jurisdiction under 28 U.S.C. § 1334 because the removed suit arises in and is related to those bankruptcy cases. More specifically, the notice stated that:

> The Knox Circuit Action brought by the Plaintiffs relates to matters connected with all three bankruptcy estates. The Knox Circuit Action alleges that the Plaintiffs were fraudulently induced to invest in eCampus and that material omissions were made regarding the interrelationships between eCampus, WBI and Wilkinson. Furthermore, the Knox Circuit Action will affect the three debtors' rights, liabilities, options or freedom of action and impact the handling and administration of the bankruptcy estates.

Attached to the notice of removal were copies of all process and pleadings filed in the state court action which include the complaint wherein the plaintiffs allege the defendants defrauded the plaintiffs in connection with the sale of the *e*campus.com securities. Accordingly, the notice sufficiently

describes a bankruptcy jurisdictional basis even without the claims of contribution and indemnity which certain of the defendants have subsequently asserted. *See, e.g., Kirk v. Hendon (In re Heinsohn)*, 231 B.R. 48, 53-54 (Bankr. E.D. Tenn. 1999)(notice sufficient if it sets forth basis for district court's exercise of jurisdiction under § 1334).

With respect to the argument that this court may not consider the contribution and indemnity claims in evaluating jurisdiction, the cases cited by plaintiffs do stand for the general proposition that the propriety of removal is adjudged from the pleadings available at the time of removal. *See Pullman Co.,* 305 U.S. at 537 (second amended complaint should not have been considered in determining right to remove which is to be determined according to pleadings at time of petition for removal); *Union Planters Nat'l Bank*, 557 F.2d at 89 ("As a general rule, removability is determined by the pleadings filed by the plaintiff."); *Blair v. Migliorini*, 744 F. Supp. at 167 ("Removability is determined on the basis of the Complaint and the Notice of Removal ... *as they read at the time* ...; subsequent events and pleadings are usually irrelevant."). However, as the transfer defendants observe, these decisions address removal under 28 U.S.C. § 1441, the general removal statute, rather than 28 U.S.C. § 1452, the

bankruptcy removal statute pursuant to which this action was removed. And, even with respect to § 1441, the Sixth Circuit Court of Appeals in recent years has permitted any perceived pleading defects in removal notices to be remedied by amendment. *See Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 164 (6th Cir. 1993)("[T]o the extent ... [the] petition for removal was technically deficient ... it was cured by subsequent information ... supplied to the district court and entered into the record of this case."); *Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963 (6th Cir. 1993)(defendant granted leave to amend removal petition to include allegations of individual partners' citizenship after time for removal had expired where diversity jurisdiction was alleged in original petition and diversity in fact existed at time of original petition). As stated by the court in both of these cases:

> [T]he time has come to apply the principles of modern pleading relating to amendments to removal petitions, and ... amendments should be permitted, to implement the spirit of the statute and rules cited herein, where the jurisdictional facts do indeed exist, and the parties are in law entitled to invoke the jurisdiction of the federal court.

Tech Hills II, 5 F.3d at 969; *Gafford*, 997 F.2d at 164 (both quoting *Stanley Elec. Contractors, Inc. v. Darin & Armstrong Co.*, 486 F. Supp. 769, 772-73 (E.D. Ky. 1980)).

Under this directive, the critical inquiry is whether federal jurisdiction did in fact exist at the time of removal. The fact that the proofs of claim asserting contribution and indemnity were not filed until after the removal to this court is not determinative. As recognized by the transfer defendants in one of their responsive briefs, the date the proof of claim was filed does not establish the date the claim came into existence; it is simply the assertion of the claim in the bankruptcy court. If the transfer defendants do have a claim for contribution and indemnity, presumably it arose either when the acts complained of in the complaint took place or upon the filing of the complaint, both of which took place prior to the date of removal. Thus, it is proper for this court to consider the alleged contribution claim in evaluating whether bankruptcy jurisdiction exists. *See In re Dow Corning Corp.*, 86 F.3d at 490 (court found "related to" jurisdiction based on defendants' contingent claims for contribution and indemnity even though proofs of claim had not yet been filed in bankruptcy case).

Based on a review of the pleadings and applicable case law, this court concludes that it has jurisdiction over this action because it is related to the cases pending in the Kentucky bankruptcy court. All of the allegations in the

amended complaint concern the plaintiffs' investments in *e*campus.com, one of the debtors. The entire basis of the lawsuit is that the defendants fraudulently conspired with debtor Wilkinson and his company, debtor WBI, to induce plaintiffs to invest in *e*campus.com, the third debtor. Even though the debtors are not defendants in this action due to the fact that their bankruptcy filings preceded the commencement of this lawsuit, the plaintiffs have filed proofs of claim in the Wilkinson bankruptcy case based on Mr. Wilkinson's alleged fraud in connection with plaintiffs' purchase of *e*campus.com stock, the same claim raised herein.

Similar allegations of conspiracy to defraud by the debtor and nondebtor defendants were made by the plaintiffs in *Dow Corning*. *See In re Dow Corning Corp.*, 86 F.3d at 494 n.11. In *Dow Corning*, the Sixth Circuit cited with approval the Fifth Circuit's decision in *Wood*, wherein the court was faced with the issue of whether "related to" jurisdiction existed in an action against three individuals, two of whom had filed chapter 11. *Id.* at 492 (citing *In re Wood*, 825 F.2d at 93-94). Although the lawsuit in *Wood* had been filed postpetition, the Fifth Circuit stated that it was unable to conclude that the suit would have no conceivable effect on that proceeding, remarking:

> The plaintiff has filed one complaint against the defendants seeking liability for their joint conduct. Success against any of the defendants will have a potential effect on the estate. For example, if Dr. Wood and his wife are held liable but Barham is not, the bankrupt estate may bear the entire burden of the judgment. If, on the other hand, Barham is found jointly liable, the estate may bear only a portion of the judgment. Moreover, in filing the complaint, the plaintiff challenged the combined actions of both the debtors and Barham, a non-debtor. Resolution of the dispute will necessarily involve, therefore, consideration of Barham's involvement in those actions. We find support in the Court of Appeals for the Sixth Circuit and lower courts, which have held that when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334.

In re Dow Corning Corp., 86 F.3d at 492 (quoting *In re Wood*, 825 F.2d at 94). As in the *Wood* decision, the instant proceeding may impact the bankruptcy case of Mr. Wilkinson. Due to the conspiracy allegation and the fact that claims have been asserted in two different venues for the same damages, resolution of this lawsuit will necessarily involve consideration of Mr. Wilkinson's involvement and recovery in one action will reduce recovery in the other. Thus, to the extent the plaintiffs are successful against the defendants, the liability of Mr. Wilkinson's bankruptcy estate will be commiserately reduced.

Further indication that this action is related to the cases pending in the Kentucky bankruptcy court is the possible contribution and indemnity claims of the transfer defendants which may have a conceivable impact on the Wilkinson and *e*campus.com bankruptcy cases. As previously observed, the plaintiffs argue that this court should not consider these claims because they have not yet been established by the defendants and cite the impossibility of such an establishment. The plaintiffs state that if the defendants are found liable for fraud or negligent misrepresentation, they will have no common law right to contribution or indemnity under Tennessee law because they were acting *in pari delicto,*[5] citing *Knox-Tenn Rental Co. v. Jenkins Ins., Inc.*, 755 S.W.2d 33, 39 (Tenn 1988)("Where the parties to a suit have been guilty of fraud in connection with the subject matter of litigation and are in pari delicto, the court of equity, in the application of the principle of unclean hands, will leave them as it finds them, refusing its aid to either.").

[5]According to BLACK'S LAW DICTIONARY, "in pari delicto" means "[i]n equal fault; equally culpable or criminal; in a case of equal fault of guilt." *Id.* at 791 (6th ed. 1990).

The Sixth Circuit expressly held in *Dow Corning*, however, that "Section 1334(b) 'does not require a finding of definite liability of an estate as a condition precedent to holding an action related to a bankruptcy proceeding.'" *In re Dow Corning Corp.*, 86 F.3d at 491 (quoting *In re Salem Mortgage Co.*, 783 F.2d at 635). Thus, it was "not necessary for the appellees first to prevail on their claims against the nondebtor defendants, and for those companies to establish joint and several liability on Dow Corning's part, before the civil actions pending against the nondebtors may be viewed as conceivably impacting Dow Corning's bankruptcy proceedings." *Id.* at 494. As stated by the court:

> A key word in the test is "conceivable." Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

Id. at 491 (quoting *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991)).

With respect to the plaintiffs' contention that there is not even a possibility of contribution or indemnity under Tennessee law due to liability of the parties *in pari delicto*, this court notes that the plaintiffs have asserted violations not only of Tennessee law, but also the laws of the states of

Kentucky and Florida. Although this court was unable to locate any Kentucky law on the subject, Florida law provides that "[t]he defense of *in pari delicto* is not woodenly applied in every case where illegality appears somewhere in the transaction; since the principle is founded on public policy, it may give way to a supervening public policy." *Kulla v. E.F. Hutton & Co., Inc.*, 426 So. 2d 1055, 1057 n.1 (Fla. Dist. Ct. App. 1983). The rule should not be applied "where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff...." *Id.* (quoting *Goldberg v. Sanglier*, 639 P.2d 1347, 1353-54 (1982)). Furthermore, consideration of the defense must await a determination of guilt of a legally cognizable wrongdoing in the first instance. *Id.*

In light of this standard, this court is unable to unequivocally conclude that the transfer defendants' contingent contribution and indemnity claims are meritless. The fact remains that the plaintiffs have alleged in their amended complaint that it was the joint conduct of the debtors and the defendants which damaged the plaintiffs and the exact same claim has been asserted against Mr. Wilkinson in his

bankruptcy case, such that the two proceedings are closely intertwined. This assertion of joint liability along with "[t]he potential for [debtor]'s being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy." *In re Dow Corning Corp*., 86 F.3d at 494. *See also Haden v. Edwards (In re Edwards)*, 100 B.R. 973 (Bankr. E.D. Tenn. 1989)(alleged joint conduct between a nondebtor defendant and a debtor may gave rise to "related to" jurisdiction). As such, this court has subject matter jurisdiction under the "related to" jurisdictional clause of 28 U.S.C. § 1334. The plaintiffs' motion for remand based on lack of jurisdiction will accordingly be denied.

The court next turns to the issue of whether abstention is required as argued by the plaintiffs. Abstention is governed by 28 U.S.C. § 1334(c) which provides:

> (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district

> court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

As this court and others have recognized,

> Subsection (c)(1) addresses those situations when courts may abstain from hearing a proceeding while subsection (c)(2) defines those situations when courts must abstain from hearing a proceeding. The former is known as permissive abstention while the latter is referred to as mandatory abstention.

In re Heinsohn, 231 B.R. at 60 (Bankr. E.D. Tenn. 1999)(quoting *Beneficial Nat'l Bank USA v. Best Receptions Systems, Inc. (In re Best Reception Systems, Inc.)*, 220 B.R. 932, 942 (Bankr. E.D. Tenn. 1998)). The plaintiffs assert alternatively that both mandatory and permissive abstention apply.

The requirements for mandatory abstention were set forth by the Sixth Circuit Court of Appeals in *Dow Corning II* wherein the court stated:

> [F]or mandatory abstention to apply to a particular proceeding, there must be a timely motion by a party to that proceeding, and the proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding.

Lindsey v. Dow Chem. Co. (In re Dow Corning Corp.), 113 F.3d 565, 569 (6th Cir. 1997). In this case, the motion to abstain

was undeniably timely; it was filed on September 19, 2001, twelve days after the first removal notice was filed on September 7, 2001. This proceeding is based on state securities law and state common law fraud causes of action and there is no indication that any other jurisdictional basis exits. The parties have not presented the court with a federal question nor does it appear that the diversity requirement is met.[6] With respect to the third factor which is whether the proceeding was commenced in a state forum of appropriate jurisdiction, the lawsuit was originally filed in the Circuit Court for Knox County, Tennessee. Although the transfer defendants contend that the Tennessee court lacks personal jurisdiction over certain of the defendants, "the existence of this action in the state court is prima facie evidence that a state court of competent jurisdiction exists." *Gonzales Constr. Co. v. Fulfer (In re Fulfer)*, 159 B.R. 921, 923 (Bankr. D. Idaho 1993). Any personal jurisdiction defenses are best resolved by the Tennessee state court. Because this court has found this proceeding to be noncore, the fifth factor for mandatory abstention, the only remaining factor to

[6]According to the amended complaint, one of the plaintiffs, Tyler Thompson, is a resident of Kentucky and defendants Gorman and Whitaker are alleged to be Kentucky residents.

consider is whether this action is capable of timely adjudication in state court.

This court recently discussed this issue in *Premier Hotel Development* wherein it was noted:

> The phrase "timely adjudication" is not defined in the Bankruptcy Code. Courts interpreting this phrase have focused on whether allowing an action to proceed in state court will have any unfavorable effect on the administration of a bankruptcy case. This focus is in accord with the fact that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." [Citations omitted.]
>
> In considering whether allowing a case to proceed in state court will adversely affect the administration of a bankruptcy case, courts have considered some or all of the following factors: (1) backlog of the state court and federal court calendar; (2) status of the proceeding in state court prior to being removed (i.e., whether discovery had been commenced); (3) status of the proceeding in the bankruptcy court; (4) the complexity of the issues to be resolved; (5) whether the parties consent to the bankruptcy court entering judgment in the non-core case; (6) whether a jury demand has been made; and (7) whether the underlying bankruptcy case is a reorganization or liquidation case.

In re Premier Hotel Dev., 270 B.R. at 254-55 (quoting *In re Midgard Corp.*, 204 B.R. at 778-79).

This court observed in *Premier Hotel Development* that the bankruptcy appellate panel in *Midgard* had opined that the last consideration was the most important in determining whether

the administration of the bankruptcy case would be impaired by adjudication in state court. *Id*. at 255. As quoted therein:

> Where a Chapter 11 reorganization is pending, the court must be sensitive to the needs of the debtor attempting to reorganize. Lengthy delays in collecting outstanding accounts or resolving other claims which might substantially enhance the viability of the estate, may prove fatal to reorganization efforts. Therefore, in considering whether or not to abstain, timely adjudication necessarily weighs heavily for a Chapter 11 debtor. [Citation omitted.] On the other hand, in a chapter 7 case or a chapter 11 case with a confirmed liquidating plan, where the primary concern is the orderly accumulation and distribution of assets, the requirement of timely adjudication is seldom significant.

Id. (quoting *In re Midgard*, 204 B.R. at 779).

Utilizing this standard, this court concluded in *Premier Hotel Development* that the debtor's chapter 11 bankruptcy case would not be affected by having a certain noncore matter resolved by the state court because the plan was a liquidating one. *Id.* Similarly, in this action, it appears from representations of counsel at oral argument and the dockets of the three bankruptcy cases that *e*campus.com's bankruptcy case has been converted to chapter 7 and liquidation plans have been confirmed in the chapter 11 cases of Mr. Wilkinson and WBI. In light of the fact that no reorganization will take place in any of the three cases in the Kentucky bankruptcy court, the required sensitivity to reorganization efforts is

inapplicable to the proceeding at hand. Based on all of the foregoing, the requirements for mandatory abstention have been met. As such, this court must abstain from hearing this noncore matter.

IV.

An order will be entered in accordance with this memorandum opinion granting the plaintiffs' motion to abstain, denying the motion to transfer venue of this action as moot, and remanding this adversary proceeding to state court from which it was removed.

FILED: May 29, 2002

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE